Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Transit-Mix Concrete Corp.) *and* Ted Katsaros. Case 29–CB–4197

26 August 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 30 March 1982 Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

This matter involves the question of whether Respondent violated Section 8(b)(1)(A) of the Act by failing to notify employees which it represents of an arbitration award directly affecting their seniority and recall rights with Transit-Mix Concrete Corp., hereinafter referred to as Transit-Mix. The Administrative Law Judge found that Respondent did not act in an arbitrary or discriminatory manner and, accordingly, he recommended that the complaint be dismissed in its entirety. The General Counsel and the Charging Party except to the Administrative Law Judge's findings and conclusions in this regard. For the reasons set forth below, we find, contrary to the Administrative Law Judge, that Respondent acted arbitrarily with regard to notifying employees of the arbitration award in question; accordingly, we conclude that by such action Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

The facts herein are simple and undisputed. In early 1976, Transit-Mix purchased the assets of Colonial Sand and Stone Co., Inc., a rival supplier of concrete. Thereafter, a meeting was held to explain the impact of this transaction upon the drivers formerly employed by Colonial Sand and Stone Co., Inc., hereinafter referred to as the Colonial drivers; this meeting was conducted jointly by Jim Geeghan and Robert Sasso, president and recording-secretary of Respondent, and Edward Halloran and A. W. Chattin, president and executive vice president of Transit-Mix. At this meeting Chattin told the Colonial drivers that they would be added to the bottom of Transit-Mix's seniority list, that they should "shape" at Transit-Mix's Bronx yard the following morning, and that all those not hired at that time would be placed on indefinite layoff, would maintain their seniority indefinitely, and should not "shape" at Transit-Mix until recalled by registered letter. The instructions to those on layoff not to "shape" at Transit-Mix until recalled by registered letter and the assurances of seniority protection were repeated *several times* both by Chattin *and* by Geeghan. Thereafter, until 1979, Transit-Mix followed this procedure, recalling by registered letter the laid-off Colonial drivers as they were needed.

In 1979, Transit-Mix became concerned about the size of its seniority list, maintaining that it should be allowed to drop those Colonial drivers who had not "shaped" or contacted Transit-Mix since 1976. Accordingly, Transit-Mix and Respondent submitted to arbitration the question of how frequently an employee should "shape" or contact Transit-Mix in order to maintain his seniority; the arbitrator's award held that an employee must "shape" or contact Transit-Mix at least once per year in order to maintain his seniority. Upon receiving the arbitrator's award, Robert Sasso, now secretary-treasurer of Respondent, contacted its stewards at Transit-Mix and told them to "get the word out"; the stewards announced the award at the "shape up" the following morning. Respondent made no other effort to communicate the terms of the arbitration award to the laid-off Colonial drivers.

It is well settled that a union breaches its duty of fair representation only when it engages in conduct affecting employees it represents which is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967). It is also well settled, however, that something more than mere negligence on the part of a union must be shown in order to support a finding of arbitrariness. *International Brotherhood of Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974).

In the instant matter, the question of whether Respondent violated its duty of fair representation is two-fold: (1) Was Respondent under any obligation to attempt to communicate the terms of the arbitration award to the affected employees, and (2) if so, did it satisfy its obligation by having its stewards announce the terms of the award at a "shape up" at Transit-Mix one morning?

With regard to the question of Respondent's obligation to attempt to communicate the terms of the arbitration award to the affected employees, we note at the outset that there is no general rule im-

posing upon unions the affirmative obligation to publicize the terms of each and every arbitration award; however, under the circumstances of this case, we find that Respondent was under such an affirmative obligation, at least with regard to the laid-off Colonial drivers. As noted above, at the 1976 meeting with Transit-Mix, Respondent's president, Jim Geeghan, voluntarily placed Respondent's imprimatur on the instructions and assurances given at that meeting, an action which we conclude would reasonably lead the laid-off Colonial drivers to give greater credence thereto. Having thus encouraged the laid-off Colonial drivers to act upon the basis of the information conveyed at that meeting, we find that Respondent was under an affirmative obligation to inform those employees when it learned that such information was no longer valid so that they could take actions to protect their interests.[1] The Board has held that a union's duty of fair representation imposes on it the duty not to purposely keep employees uninformed or misinformed concerning their grievances or matters affecting employment. *Auto Workers Local 417 (Falcon Industries)*, 245 NLRB 527 (1979).

As to whether Respondent satisfied its obligations to the laid-off Colonial drivers by having its stewards announce the terms of the arbitration award at a "shape up" at Transit-Mix one day, we find that it did not. As noted above, Respondent's secretary-treasurer, Robert Sasso, was present at the 1976 meeting with Transit-Mix when the laid-off Colonial drivers were told repeatedly not to "shape" at Transit-Mix until recalled by registered letter; furthermore, the precise subject of the arbitration in question was the employment rights of the laid-off Colonial drivers who had not "shaped" at Transit-Mix since 1976. Thus, it is clear that at the time he decided to publicize the terms of the arbitration award by an oral announcement at a "shape up" at Transit-Mix, Sasso was well aware of the fact that the laid-off Colonial drivers would not be present since they were following Respondent's specific instructions not to "shape" at Transit-Mix. In this regard, when asked why he did not provide for specific notice to the laid-off Colonial drivers, Sasso responded that "we have never done that [before] and there's no need to do it now." Under these circumstances, we conclude that Respondent's failure to notify the laid-off Colonial drivers of the terms of the arbitration award occurred due not to negligence or inadvertence, but rather to Sasso's affirmative decision not to deviate from Respondent's "normal practice." Accordingly, since Respondent set forth no rational basis for its affirmative decision not to notify specifically the laid-off Colonial drivers, we find that Respondent has arbitrarily, and without lawful and legitimate reason, failed to notify the laid-off Colonial drivers of the terms of the arbitration award in question and that by such action Respondent has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

[1] The employee interests involved here concerned the employees' seniority and recall rights, and therefore obviously related to the employees' job security. The Board has held, in other circumstances, that unions violate the duty of fair representation when they fail to follow contractual terms governing the operation of an exclusive hiring hall and by failing to inform applicants for referral that posted referral procedures were not the systems being followed. *Local 392 Plumbers (Kaiser Engineers)*, 252 NLRB 417 (1980). Similarly, the Board has found a violation of the Act where a union fails to give timely notice of significant changes in referral procedures as a breach of its duty to keep applicants informed about matters critical to their employment status. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp.)*, 262 NLRB 50 (1982).

AMENDED CONCLUSIONS OF LAW

1. Transit-Mix Concrete Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By arbitrarily, and without lawful and legitimate reason, failing to notify employees it represents of the terms of an arbitration award significantly altering the requirements to be fulfilled to maintain their seniority, Respondent has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, we will order Respondent to request the arbitrator who heard the arbitration at issue herein to reopen the proceeding to provide for notice of the terms of the award to affected employees and a retroactive grace period for those employees who have been dropped from Transit-Mix's seniority list. We will further order Respondent to post copies of the arbitration award or other notices describing the award at its offices and meeting halls and to publish these notices in its monthly newspaper. Finally, we will order Respondent to make whole those employees who lost work due to its unlawful conduct by payment to them of an amount equal to that which they would have earned but for its unlawful conduct, together with interest thereon. The amounts due shall be computed in the manner prescribed in *F. W. Wool-*

worth Co., 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Elmont, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing in its duty fairly to represent employees by arbitrarily, and without lawful and legitimate reason, failing to notify employees it represents of the terms of arbitration awards significantly altering the requirements to be fulfilled to maintain their seniority.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Request the arbitrator who heard the arbitration at issue herein to reopen the proceeding to provide for notice of the terms of the award to affected employees and a retroactive grace period for those employees who have been dropped from Transit-Mix Concrete Corp.'s seniority list.

(b) Post copies of the arbitration award or other notices describing the award at its offices and meeting halls and publish these notices in its monthly newspaper.

(c) Make whole those employees who lost work due to its unlawful conduct in the manner set forth in the section herein entitled "The Remedy."

(d) Post in conspicuous places at its business offices, meeting halls, and all places where notices to members customarily are posted copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Sign and mail sufficient copies of said notice to the Regional Director for Region 29 for posting by Transit-Mix Concrete Corp., if willing, at all locations where notices to its employees customarily are posted.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT fail in our duty fairly to represent employees by arbitrarily, and without lawful and legitimate reason, failing to notify employees we represent of the terms of arbitration awards significantly altering the requirements to be fulfilled to maintain their seniority.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL request the arbitrator who heard the arbitration at issue herein to reopen the proceeding to provide for notice of the terms of the award to affected employees and a retroactive grace period for those employees who have been dropped from Transit-Mix Concrete Corp.'s seniority list.

WE WILL post copies of the arbitration award or other notices describing the award and publish these notices in our monthly newspaper.

WE WILL make whole those employees who lost work due to our unlawful conduct, with interest.

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard before me at Brooklyn, New York, on January 4 and 5, 1982, upon a charge filed on June 11, 1980, and a complaint issued on March 31, 1981. The

[2] See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

complaint alleges that Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 282 or Respondent) violated Section 8(b)(1)(A) of the National Labor Relations Act, as amended (the Act), by failing to notify certain employees of an arbitration award issued on June 27, 1979. Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by all parties.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF TRANSIT-MIX

Transit-Mix Concrete Corp. (Transit-Mix), a New York corporation, with its principal office and place of business in New York City, is engaged in the manufacture, sale, and distribution of ready-mix concrete and related products. During the 12 months preceding the issuance of the complaint, Transit-Mix purchased, and caused to be delivered to its New York locations, goods and materials valued in excess of $50,000, from suppliers located outside New York State. The complaint alleges, the answer admits, and I find that Transit-Mix is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

On February 13, 1976, Transit-Mix entered into a purchase agreement with Colonial Sand & Stone Co., Inc. (Colonial), whereby Transit-Mix agreed to purchase certain assets of Colonial. A subsequent arbitration award determined that the purchase agreement between Transit-Mix and Colonial constituted a "buy-out" of Colonial by Transit Mix, and that, accordingly, drivers on the Colonial seniority list who lost their jobs as a result of the buy-out would be placed at the bottom of the Transit-Mix seniority list, in accordance with the applicable provision of the collective-bargaining agreement between Transit-Mix and Respondent.

At the time the purchase agreement was announced, a meeting was held for the Colonial drivers, at which approximately 200 drivers attended. A Transit-Mix representative informed the drivers that the men on the seniority list would remain on it indefinitely. The next day, when the men went to shape the Bronx yard, another Transit-Mix representative informed the drivers that everyone on the seniority list beyond the breakoff point was on "layoff until called back by registered letter."[1] There was no written announcement of the meeting and no written summary of what transpired at the meeting was sent by Respondent to the Colonial drivers.

A dispute arose between Transit-Mix and Respondent with respect to employees on the seniority list. Transit-Mix maintained that since the time of the buy-out certain employees never shaped or contacted Transit-Mix and that this was tantamount to an "abandonment of the job." Accordingly, in June 1979 Transit-Mix and Respondent submitted to arbitration the following question:

> What is the reasonable length of time within which an employee of the Company must shape up, call or contact the Company to remain part of the Company work force and retain his seniority?

On June 27, 1979, Arbitrator Herbert K. Lippman issued the following award:

> An employee who does not shape up, call or contact the Company for work for a period of one year, shall be deemed to have abandoned his position with the Company and shall no longer be considered an employee of the Company.

Robert Sasso, secretary-treasurer of Respondent, credibly testified that as soon as he received the award he notified the stewards at the two Transit-Mix barns and told them to "get the word out to the men what had transpired as far as the Arbitration Award was concerned." He conceded that he did not instruct the stewards to post the award, to notify the affected persons by mail, or to publish the award in the Local 282 newspaper. With respect to why Sasso did not take these additional steps, he testified, "in the history of this Local Union we have never done that and there's no need for me do do it now."

Albert Martelli, one of the Transit-Mix stewards, corroborated Sasso's testimony. He credibly testified that in the summer of 1979 he was notified by Sasso of the arbitration award. He testified that as a result of the notification:

> The next day, the very next morning at each and every shape I notified the men at each shape that they should shape that those who were on leave or for those who were there, I said it overall, you know, in general in the locker room that to maintain your seniority you must shape and if you didn't shape one, two or three days within that year . . . that they would lose their seniority.

Subsequent to the June 1979 arbitration award, drivers on the Transit-Mix seniority list who had not shaped, called, or otherwise contacted Transit-Mix for a period of 1 year were removed from the Transit-Mix seniority list and lost their status as employees of Transit-Mix.[2]

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[1] Based on the credited testimony of Walter Kudla and corroborated by Katsaros.

[2] Based on the testimony of Alvin Chattin, executive vice president of Transit-Mix.

Based on the above, I find that when Respondent was informed of the June 1979 award it instructed its stewards to announce the award at the Transit-Mix hiring halls. While the terms of the award were orally announced at the hiring halls, the award was not posted, nor was it mailed to Respondent's members. It was also not published in Respondent's newspaper.

B. *Discussion and Analysis*

It is well settled that a union as the exclusive bargaining representative of the employees in the appropriate unit has the statutory duty fairly to represent all those employees, both in its collective bargaining and in its enforcement of the resulting collective-bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Miranda Fuel Co.*, 140 NLRB 181 (1962); *Teamsters Local 692 (Great Western Unifreight System)*, 209 NLRB 446 (1974). A union is required to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes, supra*, 386 U.S. at 177.

The Board has held that "negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious or unfair so as to constitute a breach of the duty of fair representation. . . . Something more is required." *Teamsters Local 692 (Great Western Unifreight System), supra*, 209 NLRB at 448.

The General Counsel maintains that Respondent had an affirmative duty to notify all of the affected employees of the arbitration award. He maintains that the oral notification to the employees at the hiring hall was insufficient. Although the complaint did not so allege, the General Counsel argued at the hearing that the drivers should have received *written* notification of the arbitration award. While the General Counsel concedes that "mere negligence" by a union does not violate the Act, the General Counsel cites *Robesky v. Qantas Empire Airways*, 573 F.2d 1082, 1090 (9th Cir. 1978), for the proposition that "[a]cts of omission by union officials not intended to harm members may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary."

I do not believe that the failure of Respondent to notify the employees in *writing* or to take measures to guarantee that *all* employees were notified, constitutes the "egregious" conduct contemplated by *Robesky*. The court pointed out in *Robesky* that the trier of fact could reasonably find that the union acted in "reckless disregard" of the employee's interests. The union official was in frequent communication with the employee but neglected to inform her that her grievance had been withdrawn from arbitration. As the court pointed out, the employee, "misled" by an ignorance which the union helped to foster and which the union official "could easily have dispelled," rejected the employer's offer of reinstatement (573 F.2d at 1087). Under such circumstances the union action could be termed arbitrary. See *Singer v. Flying Tiger Line*, 652 F.2d 1349, 1354 (9th Cir. 1981), where the Ninth Circuit distinguished *Robesky* on the ground that it involved a " clear showing of prejudice."[3]

The cases cited by the Charging Party are similarly distinguishable. In *NLRB v. Teamsters Local 182*, 401 F.2d 509 (2d Cir. 1968), cert. denied 394 U.S. 213 (1969), the court affirmed the Board's finding that the union acted improperly in causing an employer to discharge an employee for failure to pay union dues. The union had failed to notify the employee that under a new union security clause he was required to join the union and pay dues.[4] In that case the union took affirmative action to cause the employee's discharge, yet failed to notify him of the essential fact under which the discharge could be avoided. No similar affirmative action was taken by Respondent in the instant proceeding.

Similarly, in *Operating Engineers Local 324*, 226 NLRB 587 (1976), the union was held to violate its duty of fair representation where it refused to comply with the employee's request for information as to his position on an out-of-work register for purposes of job referral through an exclusive hiring hall.[5] There was no allegation, nor was it shown in the instant proceeding, that employees requested information with respect to the arbitration award but were refused such information.

Finally, the Charging Party has cited *Teamsters Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981). In that case the union was conducting negotiations on behalf of a unit but failed to notify the unit employees that a wage increase would result in the elimination of the unit. The court affirmed the Board's finding that the failure to notify the unit employees of this crucial fact was an arbitrary action and constituted a breach of the union's duty of fair representation. Again, this case is distinguishable from the instant proceeding. In *Teamsters Local 860* the union was engaged in negotiations on behalf of the unit. It had a duty, in connection with those negotiations, to inform the employees of the very crucial facts of which it had knowledge. As in *Robesky, supra*, its failure to inform the employees in effect served to "mislead" them into voting in a way they would not have, had they been fully informed. In the instant proceeding, no showing has been made that Respondent acted in a misleading fashion.

Upon learning of the arbitration award, Respondent proceeded to inform its members by announcing the terms of the award at its hiring halls. As was its custom, it did not inform its members in writing of the award. Based on Board and court precedent, I find that Respondent did not act in a discriminatory or arbitrary

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[3] In this connection, see also *Teamsters (California Cartage Co.)*, 251 NLRB 331, 339 (1980), where the Board affirmed the Administrative Law Judge's decision, which stated:

> While Shepherd may have been remiss in failing to adequately and fully explain the ramifications of the proposals, such a failure does not amount to intentional and willful misleading of the employees. *Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, Local 17 (Aero Restaurant, Inc.)*, 241 NLRB 22 (1979).

[4] To like effect is *NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963), cited by the Charging Party.

[5] To like effect is *Laborers Local 252 (Seattle & Tacoma Chapters, AGC*, 233 NLRB 1358 (1977), cited by the Charging Party.

manner. Accordingly, I conclude that the complaint should be dismissed.

CONCLUSIONS OF LAW

1. Transit-Mix Concrete Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of the Act.

[Recommended Order for dismissal omitted from publication.]